Supreme Court, U. S.
FILED
JAN 15 1981
MICHAEL RODAK, JR., CLERK

No. 80-1183

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STEELWORKERS OF AMERICA, AFL-CIO, and LOCAL 1466, UNITED STEELWORKERS OF AMERICA, AFL-CIO,

Petitioners,

v.

LOUIS SWINT and WILLIE JOHNSON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BERNARD KLEIMAN
General Counsel
United Steelworkers of America, AFL-CIO
1 East Wacker Drive
Suite 1910
Chicago, Illinois 60601

CARL B. FRANKEL
Associate General Counsel
United Steelworkers of America, AFL-CIO
Five Gateway Center
Pittsburgh, Pennsylvania 15222

MICHAEL H. GOTTESMAN
(Counsel of Record)
ROBERT M. WEINBERG
JULIA PENNY CLARK
DAVID M. SILBERMAN
BREDHOFF, GOTTESMAN, COHEN, CHANIN, WEINBERG & PETRAMALO
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 833-9340

JEROME A. COOPER
COOPER, MITCH & CRAWFORD
409 N. 21st Street, Suite 201
Birmingham, Alabama 35203

Attorneys for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether a federal court of appeals is bound by the "clearly erroneous" rule of F.R.Civ. P. 52(a) in reviewing a district court's findings of fact, arrived at after a lengthy trial, as to the motivation of the parties who negotiated a seniority system.

2. Whether the "finding" of the court of appeals that the seniority system at issue here was the product of a discriminatory purpose is consistent with the teaching of this Court in *Teamsters* v. *United States* as to the meaning of § 703(h) of Title VII.

LIST OF PARTIES

In addition to the parties named in the caption, the following were parties to this proceeding in the Court of Appeals: Pullman-Standard, a Division of Pullman, Incorporated; International Association of Machinists and Aerospace Workers (IAM), and its Local No. 372. Respondents Louis Swint and Willie Johnson have been certified in this action as representatives of a class consisting of all black persons employed by Pullman at its Bessember, Alabama plant as production and maintenance employees in the bargaining unit represented by petitioner United Steelworkers of America at any time since one year prior to the filing of the first EEOC charge (it was determined below that the first such charge was filed on March 27, 1967).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTES AND RULE INVOLVED	2
STATEMENT OF THE CASE	2
A. Procedural Overview	2
B. The District Court's Opinion	3
1. The System in General	3
2. The Selection of Departmental Service As the Seniority Measure	5
3. The Shape of the Departments	6
4. The Transfer of Employees From the IAM Unit to the USW Unit	10
C. The Court of Appeals' Decision	11
REASONS FOR GRANTING THE WRIT	14
Introduction	14
I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER CIRCUITS IN ITS HOLDING THAT A COURT OF APPEALS MAY "INDEPENDENTLY DETERMINE" THE EXISTENCE OF DISCRIMINATORY PURPOSE FREE OF THE STRICTURES OF RULE 52(a)	16
II. THE RESULT REACHED BELOW IS INCONSISTENT WITH THAT REQUIRED BY THIS COURT'S DECISION IN *TEAMSTERS* v. *UNITED STATES*	23
CONCLUSION	27

TABLE OF AUTHORITIES

Cases: Page

Arlington Heights v. *Metropolitan Housing Corp.*, 429 U.S. 252 (1977) 25
Bostic v. *Boorstin*, 617 F.2d 871 (CA DC, 1980) 22
Burdine v. *Texas Dept. of Community Affairs*, 603 F.2d 563 (CA 5, 1979), petition for cert. granted, No. 79-1764, 48 U.S.L.W. 3813 (June 17, 1980) 14, 20, 21
Carroll v. *Steelworkers*, 23 FEP Cases 238 (D. Md. 1980), aff'd per curiam, No. 80-1412 (4th Cir., Dec. 2, 1980) 25
Dayton Board of Education v. *Brinkman*, 443 U.S. 526 (1979) 22
Duckett v. *Silberman*, 568 F.2d 1020 (2d Cir. 1978) 22
East v. *Romine, Inc.*, 518 F.2d 332 (5th Cir. 1975) 20, 21
EEOC v. *Chesapeake & O. Ry.*, 577 F.2d 229 (4th Cir. 1978) 22
Griffin v. *Copperweld Steel Co.*, 22 FEP Cases 1113 (N.D. Ohio 1978) 25
James v. *Stockham Valves & Fittings Co.*, 559 F.2d 310 (CA 5, 1977) 25
Kendrick v. *Comm. of Zoological Subdistrict*, 565 F.2d 524 (8th Cir. 1977) 22
Kunda v. *Muhlenburg College*, 621 F.2d 532 (3d Cir. 1980) 22
Mobile v. *Bolden*, 446 U.S. 55 (1980) 25
Pack v. *Energy Research & Development Administration*, 556 F.2d 1111 (9th Cir. 1977) 22
Papermakers Local 189 v. *United States*, 416 F.2d 980 (5th Cir. 1969) 23, 24, 26
Patterson v. *American Tobacco Co.*, 24 FEP Cases 531 (CA 4, 1980) 25
Personnel Administrator v. *Feeney*, 442 U.S. 256 (1979) 25
Sears v. *Atchison, Topeka & Santa Fe Ry.*, 454 F.Supp. 158 (D. Kan. 1978) 25
Silberhorn v. *General Iron Works Co.*, 584 F.2d 970 (10th Cir. 1978) 22

TABLE OF AUTHORITIES—Continued

	Page
Smith v. *South Central Bell Telephone Co.*, 518 F.2d 68 (6th Cir. 1975)	22
Stewart v. *General Motors Corp.*, 542 F.2d 445 (7th Cir. 1976)	22
Sweeney v. *Bd. of Trustees of Keene State College*, 604 F.2d 106 (1st Cir. 1979), cert. denied, 100 S.Ct. 733	22
Teamsters v. *United States*, 431 U.S. 324 (1977)	*passim*
United States v. *Oregon State Medical Society*, 343 U.S. 326 (1952)	23
United States v. *Yellow Cab Co.*, 338 U.S. 338 (1949)	22
Washington v. *Davis*, 428 U.S. 229 (1976)	25

Statutes and Rules:

Civil Rights Act of 1964, § 703(h), 42 U.S.C. § 2000e-2(h)	*passim*
Federal Rules of Civil Procedure 52(a)	*passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No.

UNITED STEELWORKERS OF AMERICA, AFL-CIO, and LOCAL 1466, UNITED STEELWORKERS OF AMERICA, AFL-CIO,

Petitioners,

v.

LOUIS SWINT and WILLIE JOHNSON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United Steelworkers of America, AFL-CIO, and its Local 1466, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in *Swint* v. *Pullman-Standard*, 624 F.2d 525, entered on August 18, 1980.

OPINIONS BELOW

The original opinion of the district court is reported at 11 FEP Cases 943 (N.D. Ala. 1974), and is reprinted in the separate Appendix hereto as App. F (117a-155a). The first opinion of the court of appeals is reported at 539 F.2d 77 (CA 5, 1976), and is reprinted as App. E (67a-

116a). The opinions of the district court on remand, reported at 15 FEP Cases 144 (N.D. Ala. 1977), 15 FEP Cases 1638 (N.D. Ala. 1977), and 17 FEP Cases 730 (N.D. Ala. 1978), are reprinted respectively as App. D (48a-66a), App. C (45a-47a) and App. B (23a-44a). The second opinion of the court of appeals—the decision from which certiorari is sought—is reported at 624 F.2d 525 (CA 5, 1980), and is reprinted as App. A (1a-22a).

JURISDICTION

The court below entered judgment on August 18, 1980, App. G (156a). On November 6, 1980, Mr. Justice Powell extended the time for filing this petition to and including January 15, 1980, App. H (158a). This Court has jurisdiction to review the judgment below under 28 U.S.C. § 1254(1).

STATUTES AND RULE INVOLVED

The pertinent parts of Sections 703(a), (c) and (h) and 706(g), Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-2(a), (c) and (h), and -5(g); of the Civil Rights Act of 1866, 42 U.S.C. § 1981; and of Rule 52(a), F.R.Civ.P., are reprinted in an appendix in the back of this petition.

STATEMENT OF THE CASE

A. Procedural Overview

Respondents, on behalf of themselves and other black employees at Pullman-Standard's Bessemer, Alabama plant, brought suit against Pullman-Standard ("the Company") and petitioners here, United Steelworkers of America, AFL-CIO-CLC and its Local 1466 (collectively "USW"), alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, and the Civil Rights Act of 1866, 42 U.S.C. § 1981. The issues raised by this petition concern only one of respondents' claims—that the seniority system maintained by the Company and USW violates these laws.

While this case had had a lengthy and somewhat complex history, after this Court's decision in *Teamsters* v. *United States*, 431 U.S. 324, the challenge to the seniority system boiled down to a single question: was the system adopted or maintained for a discriminatory purpose. The district court, Judge Sam C. Pointer, found "that the system is 'bona fide' and that the differences in terms, conditions or privileges of employment resulting thereunder are 'not the result of an intention to discriminate' because of race or color," and accordingly, pursuant to § 703(h) of Title VII, entered judgment for USW and the Company on this issue. App. 44a. The Fifth Circuit reversed, "because we find" the system to have "resulted from an intent to discriminate because of race." App. 16a.

B. The District Court's Opinion

The district court, having heard, in three trials, approximately 20 days of testimony, and having reviewed a mountain of documentary evidence generated in connection with the adoption and maintenance of the seniority system, including the minutes of negotiating sessions between USW and the Company spanning the period from 1941 forward, entered extensive findings of fact detailing the origins of the system and examining the underlying reasons for every aspect of the system challenged by respondents.

1. *The System in General*

The court found that in every respect the system is, and always has been, race neutral on its face and "applied equally to all races and ethnic groups." App. 28a. "To the extent the system 'locks' employees into a department and discourages transfers, it does so equally for both white and black. . . ." App. 28a-29a.

The court found that while the system had been adopted at a time when the Company engaged in overt

racial discrimination with respect to certain employment practices, it could not be inferred that such discriminatory motivation carried over into the shaping of the seniority system. For the Court found that "the seniority system under attack is essentially a product of USW aims and policies," not the aims and policies of the Company. App. 40a.

> The seniority system under attack had its genesis . . . at a period when racial segregation was certainly being practiced; but this system was not itself the product of this bias. The system rather came about as a result of colorblind objectives of a union which—unlike most structures and institutions of the era—was not an arm of a segregated society. Nor did it foster the discrimination—of treating certain jobs as being for one race or the other—which was being practiced by custom in the plant. [App. 41a.]

In this connection, the court found that "[b]lacks, constituting approximately half the work force, have played a major role in the formation and direction of the USW local, occupying positions as officers, committeemen, and negotiators." App. 34a, n. 14. Indeed, at all times blacks held positions of leadership in the local; and at all times from 1941 forward its negotiating committee—for all negotiations, including negotiations over the seniority system—consisted of equal, or virtually equal, numbers of blacks and whites. The district court further found:

> One of the few mutual and common ventures of blacks and whites at Pullman's Bessemer plant in 1941 . . . was the unionization effort by the . . . USW. The success of its drive for representation and recognition must be attributed in large part to the black workers, who constituted more than half of the election unit . . . [A]s was true in 1941 and in the intervening years, blacks were involved actively in the leadership of the local union and had at least an equal voice in the formulation of the policies and

> positions of the union—the local not being dominated by whites. . . . [T]he USW local was one of the few institutions in the area which did not function in fact to foster and maintain segregation. It cannot be said that the union served the cause of segregation; rather, it served a joint interest of white and black workers which had a higher priority than racial considerations. [App. 39a-40a.]

In addition to these general findings, the district court examined in detail the origins and history of each aspect of the seniority system that respondents had attacked. Respondents attacked two basic components of the system: first, they claimed that the selection of departmental service, rather than plant service, as the *measure* of seniority was motivated by a discriminatory purpose; second, they claimed that the departments within which seniority is determined were shaped by a discriminatory purpose.

2. *The Selection of Departmental Service As the Seniority Measure*

In the first round of collective bargaining negotiations, which began shortly after USW was certified as the bargaining representative in 1941 and resulted in a collective bargaining agreement signed in early 1942, USW's negotiating committee included two white and two black local representatives. The USW committee proposed that seniority govern layoffs, recalls and promotions, but was able to secure the Company's agreement to recognize seniority only with respect to layoffs and recalls. (Despite repeated efforts, USW was unable to obtain Company agreement to awarding promotions on the basis of seniority until 1956.) With respect to the *measure* of seniority, USW proposed, and the Company ultimately agreed upon, departmental seniority. There is no evidence that this measure was opposed by any member of USW's negotiating committee, and indeed, as the district court noted (App. 40a), one of the black negotiators

sought in a subsequent round of negotiations an even narrower seniority measure.[1] The district court found that "[t]he provision for seniority by departmental age —which, depending upon viewpoint, may be viewed either as a restriction or a protection—has been negotiated and maintained by blacks, no less than whites." App. 43a.

The district court further found that selection of departmental service as the seniority measure was, in the 1940's, the most common choice in industrial agreements generally, and in railroad equipment manufacturing plants in particular. With respect to the latter, departmental age was used at all but one plant in the industry, including plants that were virtually all-white. App. 33a, 31a, n. 7.

3. *The Shape of the Departments*

As the district court recognized, the organization of the plant into departments predated unionization and the adoption of the seniority system. App. 34a, 35a, 36a. These departments had been established by the Company for operational purposes. The establishment of the USW seniority system did not entail the creation of new de-

---

[1] In 1947 one of the black members of USW's negotiating committee proposed that the seniority measure be changed to occupational seniority. That proposal was accepted, and remained in effect through successive agreements until 1954, when the parties agreed to return to a departmental seniority system at Bessemer. In 1956, the Company agreed for the first time that promotions would be awarded on the basis of seniority. The parties continued the existing seniority measure—departmental seniority—which thus became applicable in 1956 to promotions as well as layoffs and recalls. The seniority system was not thereafter changed until 1972. In that year the Company, responding to demands of the Labor Department's Office of Federal Contract Compliance (which administers the anti-discrimination provisions of Executive Order 11246) implemented certain changes specifically designed to benefit blacks.

partments.[2] Rather, seniority was simply to apply within the departments that already existed. Thus, the seniority provision in the initial agreement simply provided that layoffs and recalls would be made in order of departmental age.

Between 1941 and 1954, changes in a handful of departmental structures occurred. The district court, upon examination of the evidence, found that each such change was prompted by considerations unrelated to race. App. 34a-37a. We describe the court's discussion of those changes that had an impact on the numerical racial composition of any department.

a. In 1941, the Company divided what had been a single Die & Tool department into two separate departments and likewise divided the Maintenance department into two departments. The district court found that these changes resulted, not from any discriminatory purpose, but simply from the fact that the National Labor Relations Board ("NLRB") had certified, over the opposition of USW, a different union—the International Association of Machinists ("IAM")—as bargaining representative for some of the employees in craft or craft-related positions in the Die & Tool and Maintenance departments. The district court found:

> The existence of these divided departments is due to actions of the NLRB in 1941, when it—at the request of other petitioning unions—divided the plant into three representational units for election purposes. This was done over the opposition . . . of the USW, which sought to represent all production and maintenance employees. The company properly

[2] Of the twenty-six pre-existing operational departments, nine relatively small departments were "one-race" departments by virtue of the Company's previous assignment practices. These nine departments contained only 11% of the blacks and 7% of the whites in USW's bargaining unit—i.e., 126 black and 80 white employees out of a total of 1151 blacks and 1173 whites—as of June, 1965. (App. 77a).

adopted a "hands-off" attitude on formulation of election units. Three separate election units were formed by the NLRB, with the International Brotherhood of Electrical Workers gaining representation status (over the USW) for two small departments, with the IAM gaining representation (over the USW) for five other departments, and with the USW gaining representation (over the Federal Labor Union) for the bulk of the employees. The unit formed by the NLRB as to which the IAM gained recognition was one which included certain positions in the Die & Tool and Maintenance departments considered by the NLRB as involving craft and craft-related jobs, but which omitted other positions in those departments, they being in the unit for which the USW gained recognition. Hence—and it is difficult to understand how the company and the USW could have legally done otherwise—it resulted that there were two Die & Tool seniority units and two Maintenance seniority units, each subpart being represented by a different union. The separation into different bargaining units was not merely, as in *Teamsters*, "consistent with National Labor Relations Board precedents," 431 U.S. at 356, 14 FEP Cases at 1527; it was rather required by a specific decision of the NLRB and the outcome of the elections. [App. 34a-35a; footnote omitted]

* * * * *

The key here is that responsibility for this situation cannot be properly be placed on either of the real defendants—the company or the USW—and that, moreover, this circumstance does not diminish the bona fides of the seniority system under attack—that between the company and the USW. [App. 34a].[3]

b. The district court found that in the late 1940's the Company created a separate Inspection department,

[3] The only seniority system at issue in this petition is that between the company and the USW. IAM has a wholly separate seniority system.

"drawing [all] the inspectors from the various operating departments into a separate unit. . . ." App. 32a. The court found that "this change was certainly rational—removing [inspectors] from responsibility to the very persons whose production they were called upon to inspect." App. 32a. The court further found that "at the time the Inspection department was created, seniority was measured by service in the occupation[4] within the department, so that its creation as a separate department deprived no one, white or black, of employment opportunities." App. 32a. Finally, in this connection, the court found that one or both of the Company's virtually all-white plants at Hammond, Indiana and Butler, Pennsylvania, have a separate Inspection department like that at Bessemer. App. 37a.

c. When the seniority system was first established, janitors and watchmen were in separate departments.[5] For a brief period (1947-1952) these two occupations were combined in the same department. Then in 1952 they were put back into separate departments and remained separate thereafter. As was the case with the Inspection department, the separation of the janitors and watchmen into different departments in 1952 occurred at a time when occupational service, not departmental service, was the measure of seniority,[6] so that when it was made the change had no effect on a janitor's opportunity to become a watchman or vice versa. Further, the court found that janitors and watchmen were in separate departments at one or both of the Company's virtually all white plants at Hammond and Butler. App. 37a. Finally, the district court found "that the possibility of merging the Janitors and Plant Protection employees was

---

[4] See note 1, *supra*.

[5] As of June, 1965, there were 10 janitors and 12 watchmen employed at the Company's Bessemer plant.

[6] See note 1, *supra*

raised in 1962 by a white member of the union negotiating committee, but rejected by a black member of that negotiating committee who was a member of the Janitors department." App. 37a.[7]

The district court engaged in an extensive comparison of the departmental structure at the Company's Bessemer plant with the departmental structures at other plants in the industry, particularly the Company's other plants at Butler ("where less than 1% of the employees were black") and at Hammond ("also having a small percentage of black employees"). App. 33a. The court concluded that the departmental structure at the Bessemer plant was "in accord with industry practice." App. 38a. "Indeed, putting aside those departments whose existence was incident to the [NLRB] recognition of . . . separate unions, the configuration of departments at Bessemer is quite similar to that at Pullman's Butler plant." App. 37a (footnote omitted).

The district court summarized its findings on the departmental structures at Bessemer as follows:

> While it is appropriate to view, as this court has done, the systems under a microscope, the ultimate objective should be to comprehend the gestalt of the system. Here, from either perspective, the court finds the departmentalization at Pullman to be rational, in accord with the industry practice, and consistent with NLRB policies. [App. 37a-38a.]

4. *The Transfer of Employees From the IAM Unit to the USW Unit.*

The district court examined the evidence relating to the following incident which respondents contended was indicative of the intent underlying the seniority system.

---

[7] The record is undisputed that the janitor job was one of the most stable in the plant. The district court found in an earlier opinion in this case, "The actual earnings of employees in the Janitors department indicate that, due to greater stability of employment, it may indeed have greater earnings potential than employment in a number of other departments . . ." App. 131a n.29.

In 1944, USW was approached by a number of employees in the IAM bargaining unit who expressed a desire to be represented by USW. USW filed a representation petition with the NLRB seeking to replace the IAM as bargaining representative for the IAM unit. On the eve of the NLRB hearing on that petition, IAM entered into a settlement agreement, witnessed by the Regional Attorney for the NLRB, whereby two-thirds of the employees in the IAM unit (100 out of 150) were to be transferred to the USW unit. Of the 100 employees so transferred, 80 were white and 20 were black. The 50 employees who remained in the IAM unit all were white. These 50, who held machinists and millwright positions, had remained loyal to IAM and had indeed been "scabbing" on USW (i.e. crossing USW picket lines). The district court found that USW's willingness to agree that these 50 not be transferred was "because it viewed them as scabs who had not honored picket lines":

> Whatever the motives of the IAM in the 1941-42 period—the court finds it unnecessary to resolve this factual dispute—the USW cannot be charged with racial bias in its response to the IAM situation. The predecessor of the USW sought to represent all workers, black and white, in the plant. It accepted additional workers of both races into its local after the election, when that opportunity presented itself. Its concurrence in the 1944 agreement, which resulted in still further blacks and whites being added to its ranks, was not due to a desire to confer any benefits upon the all-white IAM remnant; rather, it was refusing to accept those remaining whites because it viewed them as scabs who had not honored picket lines. [App. 42a.]

C. The Court of Appeals' Decision

The Fifth Circuit reversed the district court's ruling that the USW seniority system was protected by § 703 (h). The court of appeals premised that reversal on its own "find[ing]" that the system "resulted from an intent to discriminate because of race." App. 16a.

In substituting its finding of discriminatory purpose for that of the district court to the contrary, the court of appeals did not purport to set aside or find clearly erroneous any of the detailed findings of fact of the district court. The court below set forth the standard of review it apparently followed:

> In *East* v. *Romine, Inc.*, 518 F.2d 332 (5th Cir. 1975), we stated:
>
> > Although discrimination *vel non* is essentially a question of fact it is, at the same time, the ultimate issue for resolution in this case, being expressly proscribed by 42 U.S.C.A. § 2000e-2(a). As such, a finding of discrimination or nondiscrimination is a finding of ultimate fact. [Cites omitted.] In reviewing the district court's findings, therefore, we will proceed to make an independent determination of appellant's allegations of discrimination, though bound by findings of subsidiary fact which are themselves not clearly erroneous.
>
> 518 F.2d at 339. [App. 15a.]

Thus, rather than address the specific findings of the district court, the court of appeals adopted a series of broad characterizations of the record which cannot be reconciled with the district court's specific findings. Based on those characterizations it concluded that "a mistake has been made," App. 15a, terming it "crystal clear" that the seniority system was discriminatorly motivated, App. 14a. The Fifth Circuit explained that conclusion as follows:

> There is no doubt, based upon the record in this case, about the existence of a discriminatory purpose. The obvious principal aim of the I.A.M. in 1941 was to exclude black workers from its bargaining unit. That goal was ultimately reached when maneuvers by the I.A.M. and U.S.W. resulted in an all-white I.A.M. unit. The U.S.W., in the interest of increased membership, acquiesced in the discrimination while suc-

ceeding in significantly segregating the departments within its own unit.

The district court might have reached a different conclusion had it given the I.A.M.'s role in the creation and establishment of the seniority system its due consideration. No credible explanation has been advanced to sufficiently justify the separate seniority units. The Pullman-Standard plant remains the sole plant within the Pullman family with two separate bargaining units for its production and maintenance workers.

We consider significant in our decision the manner by which the two seniority units were set up, the creation of the various all-white and all-black departments within the U.S.W. unit at the time of certification and in the years thereafter, conditions of racial discrimination which affected the negotiation and renegotiation of the system, and the extent to which the system and the attendant no-transfer rule locked blacks into the least remunerative positions within the company. Because we find that the differences in the terms, conditions and standards of employment for black workers and white workers at Pullman-Standard resulted from an intent to discriminate because of race, we hold that the system is not legally valid under section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h). [App. 15a-16a.] [8]

The bottom line of the Fifth Circuit's opinion was this:

Having rejected the district court's finding . . . that the seniority system at Pullman-Standard is "bona fide" within the meaning of § 703(h) of Title

[8] In its "finding" of discriminatory purpose, the court did not differentiate among the distinct components of the seniority system—i.e. the measure of seniority and the departmental structures. Nor did the court address the question whether the system (which was common throughout the industry, including, at all-white plants) would have been different absent the discriminatory purpose it had found.

VII, . . . we reverse the judgment[] appealed from and remand to the district court for proceedings necessary to provide appropriate relief. [App. 21a-22a.]

REASONS FOR GRANTING THE WRIT

Introduction

The court below invalidated under Title VII a seniority system upon which more than 2,000 employees have based their employment expectations. It did so despite the finding of the district court that the system was not the result of a discriminatory purpose, which finding was based on, *inter alia*, the following subsidiary findings: (1) the system is race-neutral, securing equal rights for blacks and whites; (2) the system is in accord with seniority systems throughout the industry, including systems at virtually all-white plants; and (3) the system was the product of the aims and policies of a union in which blacks have consistently played a major role and whose negotiating committee has at all times consisted of equal numbers of black and white employees.

The Fifth Circuit did not set those subsidiary findings aside or find them clearly erroneous. Rather, applying the rule of appellate review presently at issue before this Court in *Burdine* v. *Texas Dept. of Community Affairs*, 608 F.2d 563 (CA5, 1979), *petition for cert. granted*, No. 79-1764, 48 U.S.L.W. 3813 (June 17, 1980) (argued December 9, 1980)—*i.e.*, that Rule 52(a), F.R.Civ. P., does not control appellate review of district court findings respecting discriminatory purpose, so that the appeals court may make an "independent determination," "free of the clearly erroneous rule," of the existence *vel non* of such purpose—the Fifth Circuit substituted its finding of a discriminatory purpose for the contrary finding of the district court. The application of this expansive doctrine of appellate review was particularly egregious in this case, because the court of appeals relied for its "find-

ing" upon supposed "facts" that have no evidentiary basis in the record, upon facts that have no rational relation to the issue of discriminatory intent, and upon inferences that are, to say the least, bizarre.

The courts of appeals are in disagreement as to whether Rule 52(a) applies to findings of motivation in discrimination cases. This Court should resolve the conflict among the circuits on this issue.

The decision below should be reviewed for another reason. This Court has not yet had occasion to give content to the statutory requirement recognized in *Teamsters* v. *United States*, 431 U.S. 324 (1977), that a plaintiff attacking a seniority system must prove that the system was the product of a discriminatory purpose. Since *Teamsters*, that issue has become one of considerable controversy. The decision below, by the Circuit in which a major portion of seniority litigation takes place, will, if left standing, constitute an important precedent on this issue. Yet that decision, while paying lip service to *Teamsters*, undermines the protection that this Court found § 703(h) was meant to provide—protection of the vested seniority expectations of incumbent employees, even at the expense of the victims of pre-Act racial discrimination in hiring or assignment, except where a seniority system is the product of a discriminatory purpose. The message of the opinion below is that courts may—indeed should—turn that protection into an illustion. This Court should intercept that message before thousands more employees have their seniority expectations taken from them in violation of the intent of Congress in enacting § 703(h).

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER CIRCUITS IN ITS HOLDING THAT A COURT OF APPEALS MAY "INDEPENDENTLY DETERMINE" THE EXISTENCE OF DISCRIMINATORY PURPOSE FREE OF THE STRICTURES OF RULE 52(a).

In the instant case, an experienced district judge, who had lived with the case for eight years, had heard weeks of testimony, and had reviewed mountains of exhibits, made a careful evaluation of whether the seniority system had been motivated by a discriminatory purpose, and arrived at findings of fact which were eminently sound, persuasively reasoned, and supported by substantial evidence at every step of the analysis. The court of appeals substituted its own "ultimate" finding on the motivation issue, relying in part upon supposed "facts" which have no evidentiary basis in the record,[9] in part upon facts

---

[9] The following are examples:

(i) The court twice asserted that "the first U.S.W. contract . . . excluded blacks from the better jobs," App. 12a, 14a. These assertions are wholly without record support; the contracts are in evidence, and reflect that neither the first USW contract, nor any that followed, contained any racial designations of jobs. (The district court found, with ample record support, that USW did not "foster the discrimination—of treating certain jobs as being for one race or the other—which was being practiced by custom in the plant," App. 41a, and, indeed, that USW was the moving force in securing an end to that discrimination prior to Title VII becoming effective, App. 41a.)

(ii) The court of appeals also twice stated that "a significant number of one-race departments were established upon unionization" and that the departmental structure was "based on no other considerations than the objective to separate the races." App. 11a, see also 16a. This is sheer invention. The departmental structure was established by the company for operational purposes long before unionization and the advent of seniority; USW merely negotiated in its first contract that departmental age would control lay-

which have no rational relation to the motivation question —*i.e. non-sequiturs* [10]—and in part upon inferences, which

---

offs and recall. The contract did not define departments; seniority was exercised within the pre-existing departments. See pp. 6-7, *supra*.

(iii) The court stated that "during the next twenty-five years, one-race departments were carved out of previously mixed departments" (App. 11a) and that the USW "succeed[ed] in significantly segregating the departments within its own units" (App. 16a). These assertions are riddled with misstatements. Only a handful of changes in the departmental structure occurred since unionization; those changes involved a minute fraction of the 2,350 employees at the plant. Moreover, as to those changes, the court simply ignored the district court's findings in each instance that the change was motivated by non-discriminatory reasons (see pp. 7-10, *supra*). And the appellate court's implication that USW was the moving force in making these changes (and did so to segregate employees) is without any support whatsoever in the record. Likewise, the court's statement that "[t]he general effect of the new department"—the opinion does not state which department—"was to restrict black workers to lower paying jobs" (App. 12a) is false; the only new departments that were created at the plant had no effect on the seniority rights of black employees. See pp. 8-10, *supra*.

(iv) Finally, in the concluding paragraph of its opinion (App. 16a), the court referred to a "no transfer rule" which the court deemed "significant" to its "finding" of discriminatory purpose. No such rule exists, as the court itself recognized earlier in its opinion, App. 3a.

[10] For example, in invalidating the USW seniority system, the court placed great stress on the motivation of the IAM, stating that the district court's failure to do so "blemishes its consideration of the genesis of the seniority system" (App. 13a-14a) and that "[t]he district court might have reached a different conclusion had it given the IAM's role in the creation and establishment of the seniority system its due consideration" (App. 16a). But the appellate court's reliance on the IAM's motivation to determine whether the USW's seniority system was discriminatorily motivated is a *non-sequitur*, for as the district court had explained, the IAM did not participate in the negotiation of the USW seniority system, App. 42a.

Similarly, the appellate court twice stated that Bessemer "remains the sole plant within the Pullman family with two separate

are, to say the least, bizarre.[11] In the course of its opinion, the court reflected its unfamiliarity with the details of the record upon which it presumed independently to determine the "ultimate" fact in the case.[12] The upshot

---

bargaining units for its production and maintenance workers" App. 16a, *see* App. 12a. But the court's suggestion that this fact has any bearing on the intent of the USW and the company in negotiating the seniority system makes no sense, since, as the district court found, the multiple bargaining units were established *by the NLRB* over the opposition of the USW and without the Company's support.

[11] One example of the "Alice in Wonderland" quality of the court of appeals' inferences is its determination that the "obvious" purpose of the IAM in ceding a portion of its jurisdiction to USW was to rid itself of the black workers in its own unit. App. 15a-16a. The IAM ceded two-thirds of its unit—100 of 150 employees—to USW, and 80 of those 100 were white. It seems less than "obvious" that a union would make that sacrifice simply to remove 20 black employees from its unit, especially when those employees did not, in any event, have seniority rights to the white workers' jobs (there being no seniority within the IAM unit except for layoff from and recall to one's own occupational classification). Again, the court ignored the evidence that IAM entered this agreement rather than lose its entire unit in the pending NLRB representation proceeding. *See* pp. 10-11, *supra*.

Also bizarre is the court of appeals' declaration that "[n]o credible explanation has been advanced to sufficiently justify the separate seniority units" resulting from the NLRB's certification of separate USW and IAM bargaining units. App. 16a. The placement of employees represented by separate unions, which have negotiated different seniority systems, in separate seniority units would not seem to require any "explanation." The district court's treatment of the same point—"If there was any industry practice to combine positions represented by different unions into the same seniority unit, this court was certainly not presented with evidence to that effect," App. 37a—is surely closer to reality.

[12] In addition to the misstatements of "fact" cited in n.9, *supra*, and the inapposite analysis cited in nn.10 and 11, two small items provide a large insight into the appellate court's lack of understanding of the details of the case. The court states that USW "allegedly" opposed the NLRB's certification of separate craft units, App. 11a, as though this rested on some intrinsically untrust-

is that the court of appeals "found" it "crystal clear" that the seniority system was impermissibly motivated although it did not dispute the district court's central findings that blacks had had at least an equal voice with whites in determining the system, that the system was one which all employees wanted, white and black alike,[13] that the system was neutral both on its face and in operation, and that the system was the same as that in use throughout the industry, including at virtually all-white plants.

The appellate activism reflected in this case is symptomatic of a general disregard by the Fifth Circuit for the proper allocation of responsibilities between district courts and courts of appeals in determining the existence or non-existence of discriminatory purpose in Title VII

---

worthy, self-serving testimony. The record contains the transcript of the 1941 NLRB hearing (P. Ex. 13 on remand), and the transcript demonstrates that USW's effort to persuade the NLRB not to permit separate craft elections was the entire focus of the hearing. The district court found that the NLRB's division of the plant into multiple units "was done over the opposition of . . . the USW," App. 35a; the appellate court's statement that it "was *allegedly* done over the opposition of . . . the U.S.W.," App. 11a, indicates that it did not know of, or read, the pertinent exhibit.

The district court, explaining why the separate IAM and USW bargaining units here were even more defensible than in *Teamsters*, noted that "[t]he separation into different bargaining units was not *merely*, as in *Teamsters*, 'consistent with National Labor Relations Board precedents,' 431 U.S. at 356; it was rather required by a specific decision of the NLRB and the outcome of the elections," App. 36a (emphasis added). The court of appeals, reflecting its misunderstanding, translated this finding as follows (App. 11a):

> The court asserted that the separation within the various units was not, as in *Teamsters*, 'consistent with National Relations Board precedent,' *Teamsters*, 431 U.S. at 356, 97 S.Ct. at 1865; but was required by a specific decision of the N.L.R.B. and the outcome of the elections.

[13] As late as 1972, at a meeting at which a majority of those in attendance were black, a proposal that a number of departments be merged was rejected. App. 34a.

cases.[13a] The key to its performance in the instant case is the Fifth Circuit's rule, which this Court already has under consideration, *Burdine* v. *Texas Dept. of Community Affairs*, 608 F.2d 563 (CA 5, 1979), *petition for cert. granted*, No. 79-1764, 48 U.S.L.W. 3813 (June 17, 1980) (argued, December 9, 1980), that Rule 52(a) does not control appellate review of district court findings respecting discriminatory purpose, so that the appeals court may make an "independent determination," "free of the clearly erroneous rule," of the existence or non-existence of discriminatory purpose. This view was most fully articulated in *East* v. *Romine, Inc.*, 518 F.2d 332 (CA 5, 1975), (cited for this point in *Burdine*, 608 F.2d at 566, and in the instant case, see *supra* at 12):

> With respect to ultimate findings of fact, furthermore, we noted in *Industrial Instrument Corp.* v. *Foxboro Co.*, *supra*, 307 F.2d at 786 n. 2:
>
> > We may reverse free of the clearly erroneous rule where . . . the issue revolves around an ultimate fact question as distinguished from subsidiary fact questions . . . .
>
> See also *Galena Oaks Corp.* v. *Scofield*, *supra*, 218 F.2d at 219.
>
> Although discrimination *vel non* is essentially a question of fact it is, at the same time, the ultimate issue for resolution in this case, being expressly proscribed by 42 U.S.C.A. § 2000e-2(a). As such, a finding of discrimination or nondiscrimination is a finding of ultimate fact. See *Hester* v. *Southern Railway Co.*, 5 Cir., 1974, 497 F.2d 1374, 1381; *United States* v. *Jacksonville Terminal Co.*, 5 Cir., 1971, 451 F.2d 418, 423-24. In reviewing the district court's findings, therefore, we will proceed to make an independent determination of appellant's allegations of discrimination, though bound by findings of

---

[13a] See note 14, *infra*.

> subsidiary fact which are themselves not clearly erroneous.

East, 518 F.2d at 339.[14]

Only one circuit has followed the lead of the Fifth in holding that Rule 52(a)'s "clearly erroneous" standard

---

[14] There can be no question but that the decision below was infected by the Fifth Circuit's erroneous view that Rule 52(a) is inapplicable in reviewing findings of discriminatory purpose. To be sure, at one point in its opinion, the court below did employ the words of the "clearly erroneous" standard of Rule 52(a); it stated that it was left "with the definite and firm conviction that a mistake has been made," App. 15a. But in a footnote to these very words the court quoted *East's* mandate that "we will proceed to make an independent determination of appellant's allegations of discrimination . . .," *ibid.*, n. 6. And the remainder of the opinion below clearly reflects that the court was exercising its supposed authority to "make an independent determination," rather than reviewing the adequacy of the district court's contrary determination. For example, the final two paragraphs of the seniority portion of the opinion recite:

> The district court *might have* reached a different conclusion had it given the I.A.M.'s role in the creation and establishment of the seniority system its due consideration . . .
>
> *We* consider significant in *our* decision [four enumerated factors] Because *we find* that the differences in the terms, conditions and standards of employment for black workers and white workers resulted from an intent to discriminate because of race, we hold that the system is not legally valid under section 703(h) . . .

App. 16a (emphasis added).

In addition to *East*, *Burdine*, and the instant case, the Fifth Circuit has invoked its "free[dom]" from Rule 52(a) to overturn district court findings of absence of discriminatory purpose in *Causey* v. *Ford Motor Co.*, 516 F.2d 416 (CA 5, 1975); *Parson* v. *Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374, 1382 (CA 5, 1978), *cert. denied*, 441 U.S. 968 (1979); *Crawford* v. *Western Electric Co.*, 614 F.2d 1300 (CA 5, 1980); *Ramirez* v. *Sloss*, 615 F.2d 163 (CA 5, 1980). Our research disclosed no instance in which the rule was invoked to overturn a district court finding of the *existence* of discriminatory purpose.

is not applicable in reviewing district court findings respecting discriminatory purpose. *Stewart* v. *General Motors Corp.*, 542 F.2d 445, 449 (CA 7, 1976). Two circuits have expressly disapproved the Fifth Circuit's rule, concluding that Rule 52(a) *does* control findings of discriminatory purpose. *Sweeney* v. *Bd. of Trustees of Keene State College*, 604 F.2d 106, 109 n. 2 (CA 1, 1979), *cert. denied*, 100 S.Ct. 733; *Kunda* v. *Muhlenburg College*, 621 F.2d 532, 544 (CA 3, 1980) citing *Sweeney*). And the remainder of the circuits have applied Rule 52(a) without adverting to the Fifth Circuit's contrary rule. *Bostic* v. *Boorstin*, 617 F.2d 871, 875 n. 18 (CA DC, 1980); *Duckett* v. *Silberman*, 568 F.2d 1020, 1023 (CA 2, 1978); *EEOC* v. *Chesapeake & O. Ry.*, 577 F.2d 229, 233 (CA 4, 1978); *Smith* v. *South Central Bell Telephone Co.*, 518 F.2d 68, 69 (CA 6, 1975); *Kendrick* v. *Comm. of Zoological Subdistrict*, 565 F.2d 524, 526-527 (CA 8, 1977); *Pack* v. *Energy Research & Development Administration*, 566 F.2d 1111, 1113 (CA 9, 1977); *Silberhorn* v. *General Iron Works Co.*, 584 F.2d 970, 971 (CA 10, 1978).

The Fifth and Seventh Circuit's rule is inconsistent with this Court's precedents. This Court has already held that the clearly erroneous standard of Rule 52(a) applies generally in reviewing "[f]indings as to the design, motive and intent with which men act," *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341, 342 (1949), and, in particular, in reviewing findings respecting racially discriminatory purpose where governmental action is challenged under the Fourteenth Amendment, *Dayton Board of Education* v. *Brinkman*, 443 U.S. 526, 534 n. 8 (1979).

The manifold errors to which the court below succumbed in attempting an "independent determination" of the "ultimate" fact in this case (see nn. 9 through 12, *supra*)—understandable in light of its comparative lack of familiarity with the record, and the conflicting de-

mands upon its time—is graphic testimony to the wisdom of this Court's admonition that "no case" is "more appropriate for adherence to [Rule 52(a)]" than one involving "a vast record of cumulative evidence as to long-past transactions, motives, and purposes," *United States* v. *Oregon State Medical Society*, 343 U.S. 326, 332 (1952).

II. THE RESULT REACHED BELOW IS INCONSISTENT WITH THAT REQUIRED BY THIS COURT'S DECISION IN *TEAMSTERS* v. *UNITED STATES*

The decision below robs § 703(h) of Title VII of the content which this Court, in *Teamsters* v. *United States*, 431 U.S. 324 (1977), found that Congress meant to give it.

For the first decade after the enactment of Title VII, the lower federal courts, led in substantial part by the Fifth Circuit in *Papermakers Local 189* v. *United States*, 416 F.2d 980 (CA 5, 1969), *cert. denied*, 397 U.S. 919 (1970), routinely invalidated a seniority system whenever such a system was shown to perpetuate the effect of pre-Act discrimination against black employees, regardless of whether the system was the product of a discriminatory intent. In so doing, notwithstanding the command of § 703(h), the lower courts repeatedly disrupted vested seniority expectations which employees had built up in reliance on race-neutral seniority systems.

In *Teamsters* v. *United States*, *supra*, this Court concluded that in so ruling the lower courts had erred. *Teamsters* recognized that in enacting § 703(h), Congress intended to protect the seniority expectations of incumbent employees:

> It is apparent that § 703(h) was drafted with an eye toward [providing] an explicit provision embodying the understanding and assurances of the Act's proponents: namely, that Title VII would not outlaw such differences in treatment among employ-

> ees as flowed from a bona fide seniority system that allowed for full exercise of seniority accumulated before the effective date of the Act. [*Id.* at 352]
>
> * * *
>
> Although a seniority system inevitably tends to perpetuate the effects of pre-Act discrimination . . . the congressional judgment was that Title VII should not outlaw the use of existing seniority lists and thereby destroy or water down the vested seniority rights of employees simply because their employer had engaged in discrimination prior to the passage of the Act. [*Id.* at 352-53]
>
> * * *
>
> Congress did not intend to make it illegal for employees with vested seniority rights to continue to exercise those rights, even at the expense of pre-Act discriminatee. [*Id.* at 354]

Teamsters thus holds, contrary to the prior decisions of the lower courts (including *Papermakers* and 14 other Fifth Circuit decisions, see 431 U.S. at 378-79 n.2 (Marshall, J. dissenting)), that a seniority system does not violate Title VII unless that system was established or maintained as the result of an intention to discriminate.

In *Teamsters* this Court did not address the meaning of the requirement of proof of discriminatory purpose (other than to make clear that proof of perpetuation of pre-Act discrimination would not suffice to establish such purpose, 431 U.S. at 352-53). Questions have subsequently arisen as to the meaning of the discriminatory purpose requirement[15] in the context of collectively-bar-

---

[15] For example, shortly after *Teamsters* was decided, the EEOC issued an Interpretative Memorandum which construed *Teamsters* to mean that:

> Where unions or units were previously segregated, discriminatory intent in the institution of a unit seniority system will be inferred. When a unit seniority system is in effect and the employer or union is made aware that it is locking in minori-

gained seniority systems. This Court has not had occasion, in the almost four years since *Teamsters* was decided, to address those questions,[16] and the lower federal courts are in the formative stages of doing so. The decision below, by the appellate court for the circuit in which a major portion of seniority litigation takes place, will, left standing, constitute an important precedent as to the import of *Teamsters*. That result should not be allowed to occur.

The decision below "disembowels" § 703(h) every bit as much as did the pre-*Teamsters* decisions which this Court overturned. *See* 431 U.S. at 353. The court below invalidated a seniority system—and compelled the disrup-

---

ties or females, discriminatory intent will be inferred if the system is maintained or renegotiated when an alternative system is available.

One court has termed this memorandum "merely an attempt to make an 'endrun' around the decision in Teamsters." *Carroll* v. *Steelworkers*, 23 FEP Cases 238 (D. Md. 1980), *aff'd per curiam* No. 80-1412 (4th Cir., Dec. 2, 1980). Similarly, the Fifth Circuit's decision in *James* v. *Stockham Valves & Fittings Co.*, 559 F.2d 310, 351-52 (1977) has spawned confusion as to the meaning of *Teamsters* by suggesting that the question "whether the [seniority] system was negotiated and has been maintained free from any illegal purpose" is simply one of several "factors" to be considered in deciding whether a seniority system is lawful under § 703(h). See, e.g., *Patterson* v. *American Tobacco Co.*, 24 FEP Cases 531, 536 n.6 (CA 4, 1980); *Pettway* v. *American Cast Iron Pipe Co.*, 576 F.2d 1157, 1192 (CA5, 1978); *Griffin* v. *Copperweld Steel Co.*, 22 FEP Cases 1113 (N.D. Ohio 1978); *Sears* v. *Atchison, Topeka & Santa Fe Ry.*, 454 F.Supp. 158 (D. Kan. 1978).

[16] In contrast, after deciding in *Washington* v. *Davis*, 428 U.S. 229 (1976) that discriminatory purpose is a required element in proof of a violation of the Equal Protection Clause, this Court has, in almost every succeeding Term, heard cases which have given the Court an opportunity to give content to that requirement. E.g., *Mobile* v. *Bolden*, 446 U.S. 526 (1979); *Personnel Administrator* v. *Feeney*, 442 U.S. 256 (1979); *Arlington Heights* v. *Metropolitan Housing Corp.*, 429 U.S. 252 (1977).

tion of seniority expectations of over 2,000 employees, white and black alike—even though (1) the system is race-neutral, securing equal rights for blacks and whites; (2) the system was the product of the aims and purposes of a union in which blacks have always played a major role and whose negotiating team has always consisted of equal, or virtually equal, numbers of black and white employees; (3) at the time the seniority measure (departmental age) was adopted, that measure was the most common choice in industrial agreements generally and was in use at all but one plant in the railroad equipment manufacturing industry, including at plants that were virtually all-white; (4) the departments within which seniority is exercised pre-existed the establishment of the seniority system and were created by the company for operational purposes; and (5) the departmental structure is in accord with industry practice, including the practice at virtually all-white plants.

To be sure, in invalidating the seniority system, the court of appeals paid lip service to the *Teamsters* standard, purporting to find a discriminatory intent. But the court evidenced no commitment to the principles that underlie that standard. The court made the *Teamsters*' "finding" without confronting the critical facts as found by the district court—indeed, as we have shown, with a decided lack of respect for the record in this case, the factual findings of the district court, and the seniority interests of the employees who work at the Bessemer plant. Thus, while the words of the court below may be the words of *Teamsters*, the hand is the hand of *Papermakers*. And the message that will go forth to the district courts in the Fifth Circuit from the pronouncement in this case will be plain: thou shalt not uphold a seniority system. This Court should intercept that message before thousands more employees find their seniority rights destroyed in violation of the intent of Congress in enacting § 703(h).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

BERNARD KLEIMAN
General Counsel
United Steelworkers of America, AFL-CIO
1 East Wacker Drive
Suite 1910
Chicago, Illinois 60601

CARL B. FRANKEL
Associate General Counsel
United Steelworkers of America, AFL-CIO
Five Gateway Center
Pittsburgh, Pennsylvania 15222

MICHAEL H. GOTTESMAN
(Counsel of Record)
ROBERT M. WEINBERG
JULIA PENNY CLARK
DAVID M. SILBERMAN
BREDHOFF, GOTTESMAN, COHEN, CHANIN, WEINBERG & PETRAMALO
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 833-9340

JEROME A. COOPER
COOPER, MITCH & CRAWFORD
409 N. 21st Street, Suite 201
Birmingham, Alabama 35203

Attorneys for Petitioners

APPENDIX

APPENDIX

STATUTES AND RULE INVOLVED

Section 703(a), Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-2(a) provides as follows:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 703(c), Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-2(c) provides as follows:

> (c) It shall be an unlawful employment practice for a labor organization—
>
> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
>
> (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of em-

ployment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Section 703(h), Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-2(h) provides in pertinent part as follows:

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, . . .

Section 706(g), Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-5(g) provides as follows:

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any

other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the persons or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

The Civil Rights Act of 1866, 42 U.S.C. § 1981 provides in pertinent part as follows:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Rule 52(a), F.R.Civ.P., provides in pertinent part:

. . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses . . .